

On March 4 Rabbitt learned of a request by Emery to maintain less than a specific width, length and height in an escapeway _/ (Tr. 110, 111). No one initially objected to Rabbitt accompanying the team to the area involving the request. A discussion occurred whether this was a right under the UMWA contract or § 103(f). This was the first time § 103(f) was expressly discussed (Tr. 112, 121, 148).

About 45 minutes later manager Boylen refused to let Rabbitt go with the group (Tr. 112, 148). At that point he renewed his 24-hour prior notice requirement. Before March 5 Rabbitt had total access to the mine and no 24-hour prior notice had been required (Tr. 113, 130, 149). Rabbitt was concerned that Emery's policies might adversely affect his ability to represent the UMWA in investigating this disaster in Utah as well as any other disasters in the future (Tr. 114). But he didn't know if the policy was directed at his activities (Tr. 122, 123).

Rabbitt also wrote to manager John Boylen on April 12, 1986 concerning sealed areas of the Wilberg mine (Tr. 105; UMWA Ex. 6). The letter followed a conversation with Emery officials (Tr. 106). About a week before April 15, 1986 Rabbitt learned from Frank Fitzek (chairman of the Deer Creek local union safety committee) that MSHA inspectors were writing numerous citations and orders alleging unwarrantable failures. 1/ The local union wanted Rabbitt's assistance in looking into these matters. The local union felt the matters were serious. It was not a point-blank request. But Rabbitt indicated he'd be there in the next week or two (Tr. 88, 125, 126).

The day before the MSHA inspection of April 15 Rabbitt called Fitzek and advised him he would respond to the request the next day. Prior to the MSHA inspector's arrival at the gate Fitzek appeared and told Rabbitt that he had notified various management personnel including White and Peacock. White was reported to have been disturbed at the arrangement (Tr. 89).

6/ 30 C.F.R. § 75.1704-1 authorizes the MSHA district manager to approve an escapeway not in compliance with the specified criteria (Tr. 110).

7/ The Federal Mine Safety and Health Review Commission has defined the term "unwarrantable failure", as contained in § 104(d)(1) of the Act, to mean that the operator failed to abate the condition or practices constituting a violation and knew or should have known the condition existed or that it failed to abate because of a lack of due diligence or indifference or lack of reasonable care, United States Steel Corporation, 6 FMSHRC 1423, 1436 (1984); Westermoreland Coal Company, 7 FMSHRC 1338, 1342 (1985) citing Zeigler Coal Co., 7 IBMA 280 (1977).